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DEVELOPMENTS IN AUSTRIAN CONSTITUTIONAL LAW

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INTRODUCTION

The year 2016 was dominated by the Austrian presidential elections, which were closer than ever before. The drama levels were increased when the Constitutional Court annulled the result of the run-off election (the first time this had happened in Austrian constitutional history). In the end, the (relatively) clear majority achieved against the Freedom Party candidate in the rescheduled election in December 2016 concluded an eventful year in politics.

Besides these core constitutional developments, it is worth mentioning that the role of the Constitutional Court is changing, with the Court's competences having been extended in the last few years. In 2014, it gained the competence to review the procedures of the parliamentary investigative committee,¹ which led to important case law in 2015. Meanwhile, since it had not been possible in the traditional Austrian constitutional framework for an individual to file a constitutional complaint against a judgment of an ordinary court, a new kind of legal protection was introduced in 2013,² giving parties in civil or criminal law cases at ordinary courts the possibility to file a constitutional complaint against the statutory provisions applied by the ordinary court of first instance; the Constitutional Court can now review the consti-

tutionality of the respective provisions at the request of a party and not only at the request of the court. The scope of this access to the Constitutional Court was significantly increased by the Constitutional Court in 2016.³

THE CONSTITUTION AND THE COURT⁴

The Austrian Constitution provides three supreme courts which are in theory equal, though distinguishable from one another in their functions: the Constitutional Court, the Administrative Court and the Supreme Court.⁵ The Constitutional Court deals with abstract and concrete judicial review of statutes and all other constitutional questions. The Administrative Court considers the conformity of administrative acts with regard to the statutory provisions, while the Supreme Court is the highest court of appeal within the system of ordinary courts. The equality between the courts is demonstrated by the lack of the provision of a constitution complaint (Verfassungsbeschwerde) for individuals. An individual does not have the possibility to file a complaint against the decisions of the Administrative Court or the Supreme Court at the Constitutional Court.⁶

The Austrian Constitutional Court consists of a President, a Vice-president and 12 ad-

¹ See the new Article 138b Austrian Constitution (Federal Law Gazette I 2014/101).

² See the amended Article 139 and 140 Austrian Constitution (Federal Law Gazette I 2013/114).

³ See Part V.

⁴ This part is based on the following paper: Konrad Lachmayer, 'The Austrian Constitutional Court', in: András Jakab / Arthur Dyeve / Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (CUP, Cambridge 2017) 75-114.

⁵ Manfred Stelzer, *The Constitution of the Republic of Austria. A Contextual Analysis* (Hart Publishing, 2011) 190-205.

⁶ The detailed interrelation between the different supreme courts is very complex.

ditional judges.⁷ All judges are appointed by the Federal President of Austria, who is bound in his appointments by the proposals of different bodies. The President, the Vice-president and six members of the Court are proposed by the Federal Government. The appointment of the other six members is based on proposals of Parliament (three from each chamber).⁸ The term of office lasts until the judges reach the age of 70.⁹ The current 12 members come from the fields of administration, the courts, the universities and solicitors' practices. Judges, lawyers, and university professors continue to exercise their professions, whereas civil servants in the public administration have to be granted leave.

In the deliberation process of the Court, the President is not entitled to vote except in cases of tie votes, when the President has the decisive vote. Regarding gender diversity, the Constitutional Court is still male-dominated; so far, there have only been male. Since 2003, the Constitutional Court has had its first female Vice-president.¹⁰ Currently, 4 (out of 12) judges at the Court are female.

The Austrian Court system has to be seen in the context of the European justice system, especially the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). The Austrian Consti-

tutional Court engaged in EU law from the moment Austria joined the EU in 1995 and has a very open attitude towards EU law.¹¹ This includes its willingness to refer questions to the CJEU for a preliminary ruling¹² and the recent decision of the Constitutional Court including the EU's Charter of Fundamental Rights in the human rights review procedure.¹³ The European Convention on Human Rights (ECHR) is formally part of Austrian constitutional law since 1958, although it was only elevated to constitutional rank by the constitutional legislator in 1964. This formal constitutional framework led to case law of the Constitutional Court which is heavily involved with the ECHR and the case law of the ECtHR.¹⁴

The Austrian Constitutional Court has a broad variety of competences, and these have increased over the decades.¹⁵ The most important competences are the decision-making power in competence conflict,¹⁶ the review of acts of Parliament¹⁷ and the review of judgments of the administrative courts of first instance with regard to human rights violations.¹⁸ Further competences include rulings in financial conflicts with the federation or state entities, the review of the legality of administrative ordinances, the review of elections or the decision on the constitutional responsibility of the highest authorities of the state.

The workload of the Court has increased steadily. While the Constitutional Court decided 694 cases in 1981, it decided 3,898 cases in 2016.¹⁹ These 3,898 decisions included 184 positive and 233 negative judgments, 338 refusals on formal grounds, 1,318 rejections (because no constitutional question was concerned) and a further 1,825 decisions (regarding legal aid, cessations of the procedure, etc.). With regard to the different competences of the Constitutional Court, 3,144 cases involved the review of human rights violations, including 1,670 asylum cases. The number of conflict of competence cases was very small in comparison (3 cases). The average length of proceedings was 143 days, or 78 days in asylum cases.

The Court has its own website,²⁰ which not only provides information about the judges but also publishes upcoming oral hearings, recent judgments and an annual report of the Court. It provides legal texts, gives information on court procedures and answers frequently asked questions, including those concerning legal aid. All judgments since the 1980s are available in German on the website of the Austrian Legal Informatics System (Rechtsinformationssystem).²¹ English translations of Constitutional Court cases are still very rare.²²

⁷ Art. 147 para. 1 Austrian Constitution.

⁸ The first chamber is the National Council (*Nationalrat*); the second chamber is the Federal Council (*Bundesrat*). The political importance of the second chamber is quite minor in Austria. Although under Austrian law hearings are not mandatory, it has become a practice that both chambers hold hearings before they propose a candidate.

⁹ Art. 147 para. 6 Austrian Constitution.

¹⁰ https://www.vfgh.gv.at/verfassungsgerichtshof/verfassungsrichter/brigitte_bierlein.en.html.

¹¹ VfSlg 14.390/1995; VfSlg 14.863/1997; VfSlg 14.886/1997; VfSlg 15.427/2000; VfSlg 17.967/2006; VfSlg 19.499/2011; VfSlg 19.632/2012.

¹² See the recent decision taken by the Constitutional Court on 28 November 2012, G-47/12 et al (questions for a preliminary ruling with regard to the data retention directive) – see in English: https://www.vfgh.gv.at/downloads/vorabentscheidungsvorlagen/Vorlage_VRDspeicherung_G_47-12_EN_4.4.2017.pdf.

¹³ See VfGH 14.03.2013, U 466/11, U 1836/11 – available in English at https://www.vfgh.gv.at/downloads/grundrechtecharta_english_u466-11.pdf.

¹⁴ See e.g. Konrad Lachmayer, 'The Austrian approach towards European human rights', VfGH 14 March 2012, U 466/11 et al (2013) Vienna Journal on International Constitutional Law 105-107.

¹⁵ See Ronald Faber, 'The Austrian Constitutional Court – An Overview' (2008) 2 ICL-Journal 49-53; Christoph Bezemek, 'A Kelsenian model of constitutional adjudication. The Austrian Constitutional Court' (2012) 67 Zeitschrift für Öffentliches Recht 115-128; Manfred Stelzer, The Constitution of the Republic of Austria. A Contextual Analysis (Hart Publishing, 2011) 197-204.

¹⁶ Art. 138 Austrian Constitution.

¹⁷ Art. 140 Austrian Constitution.

¹⁸ Art. 144 Austrian Constitution.

¹⁹ See the annual report of the Constitutional Court, available at www.vfgh.gv.at.

²⁰ www.vfgh.gv.at/.

²¹ www.ris.bka.gv.at/vfgh/.

²² In 2016, the Constitutional Court published one judgment in English: VfGH 1.07.2016, W I/2016 (run-off election); and in three cases summaries in English were provided: VfGH 13.12.2016, G 494/2015 (no right to a judicial determination of paternity), 15.10.2016, G 7/2016 (hunt on private landholdings), 15.03.2016, E 1477/2015 (assisted suicide); see also the *Bulletin of Constitutional Case-Law*, published by the Venice Commission (<http://www.venice.coe.int/WebForms/>).

The Austrian Constitutional Court has gained new review functions in recent years. In the case law of 2016, the new constitutional complaint after a judgment of first instance by an ordinary court played a crucial role. On the one hand, the Constitutional Court was confronted with the statutory limitations in certain areas of law to access to the Constitutional Court. On the other hand, the Constitutional Court itself had to concretise the procedural conditions which the applicants have to fulfill before filing a constitutional complaint.

Parliament concretised in the Constitutional Court Act the concept of a constitutional complaint from parties in ordinary courts against statutory provisions. Based on the possibility laid down in the relevant provision of the Austrian Constitution to exclude a review of certain areas of law, the Constitutional Court Act prohibited for example insolvency proceedings, proceedings regarding lease cancellations, etc., primarily for reasons of procedural efficiency.²³ The Constitutional Court declared such exceptions to the access to constitutional justice in most of the cases to be unconstitutional.²⁴ In the case about rental agreements,²⁵ the Court argued that procedural efficiency is in itself not a sufficient justification for an exception to access to constitutional justice. The Constitutional Court emphasised that the legal dispute is of existential importance for some tenants. Only in the case of the Austrian Enforcement Regulation²⁶ did the Constitutional Court accept that the urgency of the proceedings of the ordinary court is crucial. In another case, the Constitutional Court stated that the restriction of the constitutional complaints with regard to the party which appeals before the ordinary court is unconstitutional and this has to be opened up to other parties of the court proceedings.²⁷

Although in these cases the Constitutional Court reduced the obstacles to access to the Constitutional Court with regard to substantive and formal limitations, the Court itself created major formal requirements which have to be considered by the complainant. As the Constitutional Court is bound by the complaint, the constitutional complaint has to apply which words of a statutory provision have to be eliminated. This application has to be appropriate to eliminate the unconstitutionality. While the remaining part of the statutory provision has to have a comprehensible content, other provisions with an inseparable link have to be considered and the application should not be too narrow.²⁸ Thus, it is quite a challenge to file an adequate constitutional complaint.

The consequence of the new competences of the Constitutional Court is that the Court will review civil and criminal law to a much greater extent than has so far been the case. Many new constitutional complaints can be expected. Most of them will be rejected because of the strict formal requirements of the Constitutional Court. Moreover, many of the permitted appeals are dismissed on substantive grounds. This, however, does not reduce the importance of this new form of constitutional complaint.

A prominent example of the relevance of the new proceedings involves tenancy law.²⁹ The Austrian concept of tenancy law is very complex and includes various particularities. The concrete case in question concerned the limitations of the possibility for a higher rent because of the advantageous location of the rented property. This concept was considered in legal literature as a clear example of a violation of the right to equal treatment and a violation of the principle of reasonableness. The Constitutional Court, however, accepted

the governmental justification for reasons of social justice and clarified that the tenancy law cannot be considered as unconstitutional in that regard.

To conclude the introductory overview of the Austrian Constitutional Court activity, it may be noted that a significant case load of the Constitutional Court is related to asylum cases. The reason is not only to be found in the increased number of migrants (related to the migration crisis in 2015) but is also linked to the organisational framework of legal protection in asylum cases. In the last few years, the Constitutional Court has in particular had to deal with many asylum cases with regard to a constitutional amendment in the year 2008, which restricted the access of asylum seekers to the (supreme) Administrative Court. With the establishment of the administrative court of first instance in the year 2014 and the possibility to address – again – the (supreme) Administrative Court, the extraordinarily high workload was reduced, at least to a certain extent: in 2012, 2,770 incoming cases out of 4,643 concerned asylum seekers; in 2016, the total number of incoming cases was 3,920 and 1,726 concerned asylum seekers. This reduction is significantly related to the new organisational framework.

The Constitutional Court especially reviews asylum cases in the context of Art. 8 ECHR, Art. 3 ECHR or with regard to arbitrariness in the asylum proceedings. A concrete example of a relevant judgment in asylum relates to the concept of so-called legal advisors in asylum proceedings.³⁰ The Constitutional Court declared that the limitation of the involvement of these legal advisors to certain asylum proceedings violates the principle of equal treatment of foreigners.

[pages/?p=02_02_Bulletins](http://www.vfgh.at/pages/?p=02_02_Bulletins)). The *Vienna Journal on International Constitutional Law* also regularly provides summaries of judgments of the Austrian Constitutional Court in English. See <http://icj-journal.com/>.

²³ See Section 62a para. 1 Constitutional Court Act.

²⁴ See VfGH 14.06.2016, G 72/2016; 14.06.2016, G 645/2015; 26.09.2016, G 244/2016; 29.11.2016, G 370/2016 et al.

²⁵ VfGH 25.02.2016, G 541/2015.

²⁶ VfGH 08.03.2016, G 537/2015 et al.

²⁷ VfGH 02.07.2016, G 95/2016; 03.10.2016, G 254/2016 et al.

²⁸ VfGH 05.10.2016, G 435/2015 et al.

²⁹ VfGH 12.10.2016, G 673/2015.

³⁰ VfGH 09.03.2016, G 447-449/2015.

DEVELOPMENTS AND CONTROVERSIES IN 2016

*Annulment of the run-off election for the federal presidency (VfGH 1.07.2016, W 16/2016)*³¹

Politically speaking, the most significant judgment concerned the run-off election for the federal presidency. The Austrian presidential election was annulled by the Austrian Constitutional Court on July 1, 2016. The run-off vote revealed new political dimensions: the candidates of the two traditional parties (Conservatives and Social Democrats) did not even reach the run-off ballot, with the political candidates from the opposition parties³² succeeding in the first round. The run-off vote was held on May 22, 2016. No result had ever been so close in a presidential run-off election: only 30,863 votes separated the two candidates out of a total of 4.4 million votes cast. Until then, a member of the Green Party had never won the presidential elections in Austria, or had a presidential election ever been annulled.

The Austrian Constitutional Court annulled the result primarily due to the violation of formal rules of the Federal Presidential Elections Act. The formal rules are intended to prevent violations of the principles of democratic elections. The Constitutional Court recalled that legal provisions on elections aiming at preventing abuse or manipulation must be applied strictly in accordance with their wording. Therefore, the opening of the ballots and the counting of votes must be performed by the election board as a collegiate body, i.e., in the presence of all members of the board duly invited to take part in the board meeting. The Constitutional Court traditionally applies a very restrictive approach when election results are being contested with regard to the violation of these principles. However, the Court only takes violations into consideration if they could have had an influence on the election result. To clarify this criterion, the Court looks at the

overall number of votes which might have been affected by the violation and at the difference between the numbers of votes gained by the two candidates.

The Court held an extended hearing involving many heads of District Election Boards in a way that had never occurred before in any procedures of the Constitutional Court. The hearing included 90 witnesses. The Court identified formal violations and rejected the argument that it is necessary to find concrete manipulations, maintaining that it is only necessary to identify formal violations which create the potential for manipulation.

The re-vote in the election should have taken place on October 2, 2016. Due to damaged envelopes for the postal votes (caused by a production error that led to improperly sealed envelopes), the re-vote had to be postponed. As the parliamentary statute concerning the election of the Federal President did not consider the possibility of postponing the elections and it was already clear that the damaged envelopes would lead to an annulment of the re-vote, Parliament amended the relevant Act of Parliament to postpone the elections to December 4, 2016. The Austrian presidential crisis of 2016, which had never been perceived as such, was finally over.

MAJOR CASES

The core activity of the Constitutional Court involves case law in the context of rights and freedoms. Fundamental rights protection creates the greatest workload of the Court. The dynamics in rights case law is high. Three judgments from 2016 can be used to illustrate current themes of discussion both at the Court and, more generally, in the Austrian public debate. The first case refers to assisted suicide (1.), the second to paternity suits (2.) and the third to the prohibition of begging (3.). Although in all three cases the Constitutional Court did not declare any provision to be unconstitutional, they characterise

how the Court approaches sensitive cases in human rights (broad political leeway) and how the Court differentiates its case law.

Prohibition of the association 'Last resource – Association for self-determined death' does not violate constitutional rights (VfGH 15.03.2016, E 1477/2015)

The State Police Directorate of Vienna prohibited the establishment of an association called “Last resource – Association for self-determined death”. The police authority assumed a violation of Section 78 of the Criminal Code, which prohibits assisted suicide. Based on Section 12 of the Association Act, it is possible to ban unlawful associations. The founders of the association finally filed a constitutional complaint at the Constitutional Court with regard to Art. 11 ECHR. Moreover, they claimed that Section 78 of the Criminal Code was unconstitutional.

The Court dismissed the claim by arguing that the legislator has a wide margin of appreciation to define criminal acts or the unlawful aspect of crimes. With regard to Art. 8 and 14 ECHR, the Court referred to the case law of the ECtHR,³³ which does not raise any concerns as for the prohibition of assisted suicide. The Court concluded that the banning of the association, which potentially supports assisted suicide, is therefore lawful and does not violate Art. 11 ECHR.

No (automatic) right to a (judicial) determination of paternity (VfGH 13.12.2016, G 494/2015)

The applicant was an alleged biological father who tried to gain judicial determination of paternity to establish contact with the child. The mother of the child had left the applicant before the birth of the baby and married another man. As the child was born in a marriage, the husband became the legal father of the child by presumption of the Civil Code, even though both the applicant and the mother assumed that the applicant is the biological father of the child. The request to determine paternity might, however, only

³¹ The following part is based on Konrad Lachmayer, ‘The Austrian Presidential Crisis 2016’, Int’l J. Const. L. Blog, Dec. 9, 2016, at: <http://www.icconnectblog.com/2016/12/the-austrian-presidential-crisis>.

³² Candidate supported by the Green Party and candidate nominated by the Freedom Party.

³³ ECtHR 29.42002, *Pretty*, Appl. 2346/02.

be promoted by the child itself. The biological father tried to establish contact with the child by a court judgment. Although it was quite clear that the applicant was the biological father, the ordinary court denied the right of the father to contact the child because the determination of paternity was not clarified and the father was understood as a third person according to Section 188 para. 2 of the Civil Code. The father tried to challenge this section at the Constitutional Court according to Art. 8 ECHR and Art. 7 and 24 CFR.

The Constitutional Court dismissed the application. With reference to the ECtHR³⁴ case law, the Court argued that Art. 8 ECHR was applicable, but that the Austrian limitations (with regard to Section 188 para. 2 of the Civil Code) were justified. The Court referred again to the case law of the ECtHR³⁵ and stated that the ordinary courts first have to clarify if the contact with the biological father would serve the child's well-being; only as a second step would the court address the question of judicial determination of the paternity. The Court concluded that Art. 8 ECHR does not go so far as to allow the (alleged) biological father to interfere with an intact family in any case.³⁶ The legislator did not exceed its margin of appreciation.

Constitutional Limitations of the Prohibition of Begging (VfGH 14.10.2016, E 552/2016)

A recurring theme in the case law of the Constitutional Court concerns the constitutional limitation of begging.³⁷ Statutory acts of state parliaments (Landtage) prohibit begging in local communities. In a leading case, the Constitutional Court annulled a provision of the state of Salzburg in 2012,³⁸ which

established an absolute prohibition of begging in public places, thus also including "silent" begging (in contrast to aggressive begging). The Court decided that in respect of begging, Art. 8 ECHR is not applicable, but that an absolute prohibition of begging violates Art. 10 ECHR. Since then, the Court has decided various cases on the prohibition of begging in different states (Länder).³⁹

In 2016, the Constitutional Court was also engaged in a "prohibition of begging" case.⁴⁰ The town of Dornbirn (in the state of Vorarlberg) issued an administrative ordinance that prohibited begging at a local Christmas market. The Constitutional Court dismissed the constitutional complaints as the state provision considered the case law of the Constitutional Court. In an important part of the judgment, the Court stated, however, that even silent begging could be prohibited under certain circumstances (involving expected concrete and disruptive effects on community life). The local community had to prove in each case that such a disruptive effect was present and this had to be accepted by the Constitutional Court.

CONCLUSION

Setting aside the case of the presidential election, the year 2016 can be considered as a rather typical year for the Constitutional Court. The Court embraced its new competences concerning the constitutional complaint against statutory provisions applied by ordinary courts in civil and criminal law proceedings. The Court is still busy with asylum cases, although the overall case load has

been reduced. With regard to human rights cases, the Court has continued its established case law.

The year 2017 already promises interesting case law in the context of the principle of equal treatment regarding e-cigarettes,⁴¹ electronic cars⁴² and private schools.⁴³ Democracy will be concerned when it comes to the funding of political parties⁴⁴ and tax privileges for political parties. Important judgments will be made regarding the authorisation of important infrastructural projects, especially in the context of the extension of Vienna International Airport. Moreover, the Constitutional Court will be further concerned with questions of social justice in the context of tenancy law.⁴⁵

³⁴ See ECtHR 15.9.2011, *Schneider*, Appl. 17080/07; 25.11.2003, *Pini*, Appl. 78028/01 and 78030/01; EGMR 29.6.1999, *Nylund*, Appl. 27110/95; 1.6.2004, *Lebbink*, Appl. 45582/99.

³⁵ See ECtHR 21.12.2010, *Anayo*, Appl. 20578/07; 15.9.2011, *Schneider*, Appl. 17080/07; 2.12.2014, *Adebawale*, Appl. 546/10.

³⁶ Again with reference to the ECtHR 22.3.2012, *Kautzor*, Appl. 23338/09; 22.3.2012, *Ahrens*, Appl. 45071/09.

³⁷ The case law started in 2007: VfGH 05.12.2007, V 41/07.

³⁸ VfGH 30.06.2012, G 155/10.

³⁹ VfGH 30.06.2012, G 118/11; 06.12.2012, G 64/11; 01.10.2013, B 1208/2012.

⁴⁰ VfGH 14.10.2016, E 552/2016.

⁴¹ VfGH 14.3.2017, G 164/2017.

⁴² VfGH 23.02.2017, E 70/2017.

⁴³ VfGH 15.03.2017, G 394/2016.

⁴⁴ VfGH 2.03.2017, G 364/2016.

⁴⁵ The Constitutional Court already decided on certain questions of tenancy law in 2016 (VfGH 12.10.2016, G 673/2015), but will have to deal with further, even more fundamental questions of tenancy law in 2017.

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